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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 72.

DAVID WALTON CRAMP, JR.,
Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF FOR APPELLEE.

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vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF FOR APPELLEE.

QUESTIONS PRESENTED BY APPELLANT.

Appellant asserts the unconstitutionality of Sections 876.05 and 876.06, Florida Statutes, which require public employees to execute the following oath:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of .....

> and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches directly or indirectly the overthrow of the Government of the United States or of Florida by force or violence."

Both in the Notice of Appeal and Jurisdictional Statement and in Appellant's Brief, counsel for Appellant attacks the prescribed oath as a whole without always clearly pointing out the specific portion of the oath to which a particular attack is directed. We believe that it will be difficult to determine the strength of particular attacks, or the sufficiency of the raising of the particular questions, without breaking the oath down into its various parts and keeping in mind the specific language that is the subject of the particular attack that is made. We accordingly rephrase what we understand to be the contentions that are here made by Appellant so as to direct the particular contentions to the specific portions of the prescribed oath to which the contentions appear to apply. Appellant's contentions, as we understand them, are as follows:

(a) That requiring a school teacher as a condition to public employment to execute an oath that "I am not a member of the Communist Party and I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence" is a violation of due process of law;

(b) That requiring a public school teacher (who swears in this case that he has never lent his aid, support, advice, counsel or influence to the Communist Party) to file an oath to that effect with public school authorities is to require an unconstitutional "expurgatory" oath and is an unconstitutional *ex post facto* law and an unconstitutional bill of attainder; and

(c) That requiring a public school teacher as a condition to public employment to disavow belief in the overthrow of the Government of the United States or of the State of Florida by force or violence violates the First Amendment guarantees of freedom of thought and belief.

There is a further contention of Appellant that is, at least in part, encompassed within some of the above three questions but which since it is directed to all three of the portions of oath above referred to, we will discuss separately; and that is the question of vagueness. The fourth question then is:

Is a state statute unconstitutionally vague (in violation of the Fourteenth Amendment) that requires a school teacher as a condition to public employment to execute an oath including the following:

(1) "I have not * * * lend (lent) my aid, support, advice, counsel or influence to the Communist Party";

(2) "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence";

(3) "I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence".

STATEMENT OF THE CASE.

Appellant's Statement of the Case is substantially correct. However, we note the following omissions or inaccuracies:

1. Appellee's failure to ask Appellant to execute the required oath during the period he was employed in the Orange County school system prior to 1960 was due to an oversight. The situation was set out in the Florida Supreme Court opinion as follows:

> "Plaintiff Cramp had served approximately nine years in the public school system of Orange County. It was then discovered that through an oversight, he had never been required to execute the oath required by Section 876.05, Florida Statutes. The Appellee Board immediately demanded that the oath be executed." (R. 11).

2. In Appellant's Complaint in this case he in fact swore to the very things that he says in the Complaint he cannot constitutionally be required to swear to (R. 2, 4).

3. While the Circuit Court determined Sections 876.05 and 876.06, Florida Statutes, to be constitutional and valid as to Appellant and not subject in any respect to the attacks made on same by Appellant in his Complaint, such Circuit Court did not determine, at least in so many words, "that Cramp had to sign the oath" (R. 9) as asserted in Appellant's Brief (Br. 6).

SUMMARY OF ARGUMENT.

Appellant's Brief is a broadside directed against loyalty oaths in general. As already remarked, it is impossible to weigh the strength of any particular attack without break-

ing the oath here in question into its component parts and analyzing the particular attack in the light of the actual language against which such particular attack is directed.

When the oath here in question is thus broken down (and when it is considered that under the Florida cases scienter is implied in each provision of the statute), it is readily apparent that the only provison in the oath still fairly open to question is the provision that affiant shall swear that he has not lent his aid, support, advice, counsel or influence to the Communist Party which apparently relates to the remote past as well as the immediate past. It is our position that the statute is constitutional and valid even as to one who, in the remote past only, knowingly lent aid, support, advice, counsel or influence to the Communist Party; but this contention is a subordinate one. Our primary contention is that Appellant is not in position to raise the question; that he swears he never lent aid, support, advice, counsel or influence to the Communist Party and the statute cannot possibly be unconstitutional as to him. He is not in position to have determined in this proceeding the validity of the statute so far as it affects someone else not a party to this proceeding.

Aside from the retrospective feature of the required oath, the provision of the oath which can most plausibly be contended as being still open to question is the provision that affiant does not "believe in the overthrow of the Government of the United States or of the State of Florida by force or violence". This question, for reasons stated in the body of our argument, we do not believe is in fact open at the present time. If it is open, however, we take the position that reason and logic support the position that no constitutional rights of a school teacher are violated by being required to swear that he does not believe in the overthrow of the Government of the United States or of

the State of Florida by force or violence. It is also our position that this question was not sufficiently raised in or passed on by either of the State Courts as to require decision.

JURISDICTION OF THIS COURT.

On May 29, 1961, this Court entered an order postponing consideration of the question of jurisdiction to the hearing of the case on the merits (R. 23).

Our motion to dismiss was based on the grounds (a) that the appeal does not present a substantial Federal question and (b) that in part the Federal questions sought to be raised were not timely or properly raised or expressly passed on by the court below.

The three clauses of the required oath to which the questions presented by Appellant are directed are the following: (1) "I am not a member of the Communist Party; * * * I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or Florida by force or violence", (2) "I have not * * * lend (lent) my aid, support, advice, counsel or influence to the Communist Party", and (3) "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence". In addition to questions presented by Appellant directed to the three clauses separately he presents the question of unconstitutional vagueness as to all three clauses.

It is our position that the attack made on the basis of vagueness does not present a substantial question.

It is our position that the attack made on clause (1) does not present a substantial question.

As to the primary attack made on clause (2), while we recognize that a substantial question would be presented if it were raised by a person in position to raise it, it is our position that Appellant is not in position to raise the question. There are several subordinate questions raised by Appellant as to clause (2). As to these subordinate questions it is our position that they are are not substantial questions and further that Appellant is not in position to raise them.

With regard to clause (3) it is our position both that the question sought to be presented is not a substantial one and also that the question was not raised in or passed on by either the Supreme Court of Florida whose judgment is under review or by the trial court in Florida whose decree was affirmed by the Supreme Court of Florida.

The questions of jurisdiction will be argued in connection with the argument of the questions on the merits.

ARGUMENT.

1. The Contention That Requiring a School Teacher As a Condition to Public Employment to Execute an Oath That "I Am Not a Member of the Communist Party and I Am Not a Member of Any Organization or Party Which Believes in or Teaches, Directly or Indirectly, the Overthrow of the Government of the United States or of Florida by Force or Violence" Is a Violation of Due Process of Law Does Not Present a Substantial Federal Question.

If scienter were not implicit in the prescribed oath, our Florida statute would, of course, have to be declared unconstitutional on the same basis that the Oklahoma statute

was declared unconstitutional in *Wieman* v. *Updegraff*,[1] 344 U.S. 183, 73 S. Ct. 215, 97 L. ed. 216; but in 1957 (long prior to the time here relevant), the Supreme Court of Florida in *State* v. *Diez*, 97 So.2d 105, citing the Garner case hereinafter referred to and other cases decided by this Court, had held that the element of scienter was implicit in our statute, and in the present case the Supreme Court of Florida reaffirmed the holding of the Diez case in this regard (R. 13-14).

In *Garner* v. *Board of Pub. Works*, 341 U.S. 716, text 724, 71 S. Ct. 909, 95 L. ed. 1317, text 1324, this Court said with regard to the oath there involved:

> "We assume that scienter is implicit in each clause of the oath."

In *State* v. *Diez*, 97 So.2d 105, the Florida Supreme Court, while holding that the informations before it were defective in that, if all material allegations of the informations were proved by the state, the defendant could be convicted of perjury regardless of lack of knowledge on his part when he had at some time or other subscribed in some way or other to some movement or other that was later found to be communistic in design or purpose, continued:

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1. In the Supreme Court of Florida's opinion in our case the Court referred to *Wieman* v. *Updegraff* as involving "a similar loyalty oath" (R. 14) and in our Motion to Dismiss filed in this Court (page 4 of our Motion) we referred to our having "substantially the situation of *Wieman* v. *Updegraff*" if scienter were not implict in the prescribed oath. Both statements, of course, referred to the oaths being similar from the standpoint of considering the question of scienter, and the effect if scienter was not to be implied; but the oaths are actually far from identical and from other standpoints than the scienter question there are important differences between the two oaths.

> "This conclusion does not lead us to a decision declaring the act unconstitutional because we think it is inherent in the law that when one takes the oath that he has not lent aid, advice, counsel and the like to the Communist Party, he is representing under oath that he has not done so knowingly."

In the present case the Supreme Court of Florida discussed the question of scienter as follows:

> "It is asserted that the prescribed oath does not include an element that the maker thereof had knowledge of the subversive nature of the affiliations at the time he engaged in them. In other words, appellant contends that a man should not be held liable for a false oath if he swears to non-subversive associations when in effect, he is or has been innocently and unknowingly aligned with a subversive organization. We think this matter has been placed at rest by us as well as by the Supreme Court of the United States. In State v. Diez, Fla., 97 So.2d 105, we held that the element of scienter was implicit in each of the requirements of the statute. Conceding the essentiality of this element, we there upheld the statute with our interpretation to the effect that implied in each requirement was the presence of scienter or knowledge. Although appellant avers that this constitutes 'a judicial amendment of the statute' we find ourselves supported in such an interpretation by respectable authority." (R. 13-14).

(And as supporting the Court's position the Supreme Court of Florida here cited the Garner case and other cases decided by this Court.)

Appellant in our case raised in both the trial Court and the Supreme Court of Florida the question of whether his rights were unconstitutionally impaired by reason of scienter not being express in the Florida statute. However,

neither Appellant's Jurisdictional Statement nor his Brief on the merits makes any such claim in this Court[2] and I think we may justifiably assume that the question of scienter is now out of the case.

With the question of scienter out of the way, there is no substantial Federal question left open by the decisions of this Court so far as a requirement that a teacher swear that he is not a member of the Communist party or a member of an organization or party which believes in, or teaches, the overthrow of the Government by force or violence, is concerned. A part of the oath sustained by five of the six participating Justices in *American Communications Asso. v. Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. ed. 925, was a provision that the affiant "is not a member of the Communist Party" (See p. 386 of 339 U.S., p. 936 of 94 L. ed.) and a part of the oath sustained in *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, 71 S. Ct. 909, 95 L. ed. 1317, was a provision that affiant is not "now" a member of or affiliated with "any group society, association, organization or party which advises, advocates or teaches * * * the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California".

In *Pockman* v. *Leonard*, 345 U.S. 962, 73 S. Ct. 951, 97 L. ed. 1381, this Court dismissed for the want of a substantial federal question an appeal seeking to review a decision of the Supreme Court of California in *Pockman* v. *Leonard*, 39 Cal. 2d 676, 249 P.2d 267, which sustained an oath prescribed by a statute that required each civil defense worker to swear that he did not belong to any organization that advocated overthrow of government by force or violence or other unlawful means.

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2. See page 14 of Appellant's Brief for a recognition that knowledge is in fact implied in the Florida statute.

In *Barenblatt* v. *United States*, 360 U.S. 109, text 128, 79 S. Ct. 1081, 3 L. ed. 2d 1115, text 1130, this Court stated:

> "This Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. See Gerende v. Board of Supervisors of Elections, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565; Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 95 L. ed. 1317, 71 S. Ct. 909. See also Beilan v. Board of Public Education, 357 U.S. 399, 2 L. ed. 2d 1414, 73 S. Ct. 1317, 1324; Lerner v. Casey, 357 U.S. 468, 2 L. ed. 2d 1423, 78 S. Ct. 1311, Adler v. Board of Education, 342 U.S. 485, 96 L. ed. 517; 72 S. Ct. 380, 27 A.L.R. 2d 472."

(The cases cited above in the Barenblatt case, of course, dealt not only with "those occupying or seeking public office" but with public employees as well.)

See also: *Pickus* v. *Board of Education*, 9 Ill. 8d 599, 138 N.E.2d 532; *Thorp* v. *Board of Trustees*, 6 N.J. 498, 79 A.2d 462 (Judgment vacated as moot in 342 U.S. 803, 73 S. Ct. 7, 96 L. ed. 608); *Laba* v. *Newark Board of Education*, 23 N.J. 364, 129 A.2d 273; *Fitzgerald* v. *City of Philadelphia*, 376 Pa. 379, 102 A.2d 887.

2. The Contention That Requiring a Public School Teacher (Who Swears in This Case That He Has Never Lent His Aid, Support, Advice, Counsel or Influence to the Communist Party) to File an Oath to That Effect with Public School Authorities Is to Require an Unconstitutional "Expurgatory" Oath and Is an Unconstitutional Ex Post Facto Law and an Unconstitutional Bill of Attainder Does Not Raise a Substantial Federal Question.

We do not question that if we had in this case the situation of a public school teacher who had lent aid, support, advice, counsel or influence to the Communist Party twenty or thirty years before the passage of the act here in question but who swears that he is not now a member of the Communist Party or any organization or party which believes in or teaches the overthrow of the Government of the United States or of Florida by force or violence and will not lend his aid, support, advice, counsel or influence to the Communist Party in the future, we would have a substantial federal question as to whether such a teacher could be denied public employment; but we have here no such situation.

The situation in our case was set out in the opinion of the Florida Supreme Court (R. 18-19) as follows:

> "By the allegations of his complaint, the appellant under oath affirmatively denied any present or past associations which would preclude him from executing the subject oath. He stated in his complaint '* * * that he has not, does not, and will not lend (sic) aid, support or advice (sic) counsel or influence to the Communist Party; * * *' Further, the appellant disavows any belief in the violent overthrow of either the State or Federal government. He denies membership in any organization which believes in or teaches such conduct. The complaint alleges that appellant 'is

> a loyal American' and he states that he does not decline to execute the required oath because of fear of penalties for the making of a false oath."

Appellant's complaint was sworn to by him (R. 4). The detailed allegations of paragraph 6 of the complaint which are summarized in the above excerpt from the Florida Supreme Court's opinion will be found at R. 2.

The Florida Supreme Court disposed of Appellant's bill of attainder and *ex post facto* contentions (R. 19) as follows:

> "• • • there could not possibly be a legislative adjudication of guilty for the simple reason that the complaint on which appellant stands affirmatively points out that appellant has never been connected with any organization that could result in guilt. Furthermore, as to this appellant the statute could not constitute an ex post facto law for the obvious reason that appellant asserts that he has never in the past been connected with any association which could lead to current punishment. In short, because of the allegations of his own complaint the appellant teacher has unequivocally demonstrated that he has no standing to assault the subject statute on the grounds that it is a bill of attainder, or an ex post facto law."

In the light of the allegations of Appellant's complaint the case of *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146 (D.C. Dist. Col.), affirmed without reaching this issue in *National Maritime Union of America* v. *Herzog*, 334 U.S. 854, 68 S. Ct. 1529, 92 L. ed. 1776, is of considerable interest. The facts are set out at page 154 of 78 F. Supp. as follows:

> "Although it is alleged that neither Curran, the president of the Union, nor any other officer, has executed and filed the affidavit contemplated by Sec.

> 9 (h), the complaint, verified by Curran, contains this affirmative allegation: '* * * plaintiff Curran is not a member of the Communist Party, is not affiliated with said Party, does not believe in or advocate the overthrow of the government by force and violence, is not knowingly a member of and does not knowingly support or believe in any organization which advocates such doctrines, but has not executed the affidavit required by statute for the reason that it constitutes a trespass upon and an impairment of his right of free speech, press and assembly, and for the further reason that the language of the statute is too vague, ambiguous and uncertain to establish a reasonable standard of conduct.'"

In regard to this the Court stated (p. 154 of 78 F. Supp.):

> "It thus appears that Curran has filed with us the affidavit which he asserts is unconstitutionally required by the statute. Filing with the Board an affidavit substantially similar to that contained in his complaint would prevent the denial of statutory benefits to his Union as far as his position as president is concerned. He is, consequently, quite willing and able to make the statutory affidavit but refrains from making and filing it with the Board solely because he regards Sec. 9 (h) as unconstitutional. Since he is not adversely affected by the statute, no injury can come to him as an individual because of it. It follows that he asks us to answer an academic question for him, which the courts consistently decline to do."

Right on the face of things, we submit, there can be no question that the Florida Supreme Court was correct in its holding that the subject statute is not a bill of attainder or an *ex post facto* law *as to Appellant;* and in view of the well-established rule that one may not claim standing in this Court to vindicate the constitutional rights of some third party (*Tyler* v. *Judges of the Court of Registration,*

179 U.S. 405, 21 S. Ct. 206, 45 L. ed. 252; *Liberty Warehouse Company* v. *Burley Tobacco Growers' Cooperative Marketing Association*, 276 U.S. 71, 48 S. Ct. 291, 72 L. ed. 473), there would, of course, be here no occasion for this Court to determine whether under circumstances not before the Court the subject statute might conceivably be a bill of attainder or an *ex post facto* law as to some third party. The policy of "strict necessity" in disposing of constitutional issues has been many times announced by this Court. See: *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 67 S. Ct. 1409, 91 L. ed. 1666.

A determination that the statute prescribing the clause of the oath we are now discussing could not be a bill of attainder or an *ex post facto* law as to Appellant would then leave the following as the only question actually open to Appellant to raise with regard to such clause:

Where a public school teacher before any discharge brings a suit for a declaratory decree asserting in his sworn complaint that he has never lent his aid, support, advice, counsel or influence to the Communist party, is he entitled to a declaratory decree adjudging to be unconstitutional as to him a statute requiring him as a condition to continued employment to file with the public school authorities an oath swearing to the same things that he has sworn to in such complaint?

We submit that such contention can scarcely rise to the level of a constitutional controversy. This Court has held that only those who are adversely affected by a statute can draw in question its constitutional validity in a declaratory judgment proceeding as in any other: *Alabama State Federal of Labor* v. *McAdory*, 325 U.S. 450, text 463, 65 S. Ct. 1384, 89 L. ed. 1725, text 1736. This Court has said time and time again that a party insisting upon the

invalidity of a statute, as violating any constitutional provision, must show some injury to him before the courts will listen to his complaint: *Coffman* v. *Breeze Corporation*, 323 U.S. 316, text 325, 65 S. Ct. 398, 89 L. ed. 264, text 271; *Voeller* v. *Neilston Warehouse Co.*, 311 U.S. 531, 61 S. Ct. 376, 85 L. ed. 323; *Peoples Banking Co.* v. *Sterling*, 300 U.S. 175, 57 S. Ct. 386, 81 L. ed. 586; *Premier Pabst Co.* v. *Grosscup*, 298 U.S. 226, 56 S. Ct. 754, 80 L. ed. 1155.

Not only has Appellant failed to show any injury to him by being required to file with the school authorities an oath swearing to the things that he swears to in the case itself but, if he is actually innocent of having lent aid, support, advice, counsel or influence to the Communist Party in the past, it is difficult to see how requiring him to file an oath to that effect could possibly violate his constitutional rights anyway. Such an "expurgatory" oath was sustained in *Garner* v. *Board of Public Works*, 341 U.S. 716, text 720-721, 71 S. Ct. 909, 95 L. ed. 1317, text 1323. The discussion of the Garner and other cases in *Speiser* v. *Randall*, 357 U.S. 513, text 527-529, 78 S. Ct. 1332, 2 L. ed. 2d 1460, text 1473-1475, serves to emphasize that there could be no possible constitutional objection to requiring Appellant here to reiterate before the public school officials what he had already sworn to in his complaint. As the Florida Supreme Court said (R. 19):

> "It being clear from the allegations of his own complaint that he has never been affiliated with any proscribed association, we are not persuaded that the requirement that he so state under oath could adversely affect him."

We submit that Appellant clearly does not present as to this particular clause of the oath any substantial federal question that he is entitled to raise.

But while we do not see how Appellant can possibly be held to present any substantial question that he is entitled to raise as to the clause of the oath that we are now discussing, we will nevertheless discuss three questions which Appellant discusses, or mentions, in his Brief and which deal with the clause referred to. The third of these questions we are frank to admit, we feel, would be a fairly open question if raised by a party who had a right to raise same. The first two questions we do not feel are fairly open no matter by whom raised.

These questions are: (a) Does the statute unconstitutionally require an "expurgatory" oath? (b) Does the statute unconstitutionally require the disclosure of past associations? (c) Is the statute an unconstitutional bill of attainder or *ex post facto* law as to a teacher who did knowingly lend aid, support, advice, counsel or influence to the Communist Party in the remote past knowing of its subversive nature but who has since repented?

We will discuss these three questions in the order stated:

(a) Does the Florida Statute Unconstitutionally Require an "Expurgatory" Oath?

In the light of the Garner case, the Gerende case and the Douds case, and the discussion of these cases in the Speiser case and the second Konigsberg case, it is difficult to see how Appellant's claim as to the Florida statute unconstitutionally placing the burden of proof on school teachers to prove their loyalty can be said to be an open one at all.

In *Speiser* v. *Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. ed. 2d 1460, this Court was dealing with a provision of the California Constitution that "no person or organization

which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilies" shall receive any exemption from taxes and a statute requiring applicants for tax exemption to sign a statement on his tax return declaring that he does not engage in the activities mentioned in the constitutional provision. This Court, in holding that the statute, in connection with the constitutional provision, unconstitutionally placed on an applicant the burden of producing evidence and convincing the factfinder of his innocence, recognized that this Court was there dealing with a situation different than was involved in the types of cases dealt with in the Garner, Gerende and Douds cases, as follows (pp. 527-528 of 357 U.S.):

> "The appellees, in controverting this position, rely on cases in which this Court has sustained the validity of loyalty oaths required of public employees, Garner v. Board of Public Works, 341 U.S. 716, 95 L. ed. 1317, 71 S. Ct. 909, Gerende v. Board of Supervisors, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565, and officers of labor unions. American Communications Asso. v. Douds, 339 U.S. 382, 94 L. ed. 925, 70 S. Ct. 674, supra. * * * The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public. The present legislation, however, can have no such justification. It purports to deal directly with speech and the expression of political ideas.
>
> * * *
>
> "Moreover, the oaths required in those cases performed a very different function from the declaration in issue here. In the earlier cases it appears that the loyalty oath, once signed, became conclusive evidence

of the facts attested so far as the right to office was concerned. If the person took the oath he retained his position. The oath was not part of a device to shift to the office-holder the burden of proving his right to his position. * * * in the present case, however, it is clear that the declaration may be accepted or rejected on the basis of incompetent information or no information at all. It is only a step in a process throughout which the taxpayer must bear the burden of proof."

In *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 6 L. ed. 2d 105, text 118-119, this Court stated:

"In Speiser v. Randall, 357 U.S. 513, 2 L. ed. 1460, 78 S. Ct. 1332, we held unconstitutional a state procedural rule that in order to obtain an exemption a taxpayer must bear the burden of proof, including both the burdens of establishing a prima facie case and of ultimate persuasion, that he did not advocate the violent overthrow of government. * * *

"It would be a sufficient answer to any suggestion of the applicability of that holding to the present proceeding to observe that Speiser was explicitly limited so as not to reach cases where, as here, there is no showing of an intent to penalize political beliefs. Distinguishing Garner v. Board of Public Works, 341 U.S. 716, 95 L. ed. 1317, 71 S. Ct. 909; Gerende v. Board of Supervisors, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565, and American Communications Asso. v. Douds, 339 U.S. 382, 94 L. ed. 925, 70 S. Ct. 674, the Court said (p. 527):

" 'In these cases * * * there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. * * * Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to

penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.'

"But there are also additional factors making the rationale of Speiser inapplicable to the case before us. There is no unequivocal indication that California in this proceeding has placed upon petitioner the burden of proof of nonadvocacy of violent overthrow, as distinguished from its other requirement of 'good moral character'. * * * Requiring a defendant in a civil proceeding to testify or to submit to discovery has never been thought to shift the burden of proof to him."

In the light of these cases we submit that the question Appellant attempts to raise as to burden of proof is not at present an open one in this Court.

(b) Does the Florida Statute Unconstitutionally Require the Disclosure of Past Associations?

Appellant, while apparently admitting (Br. 14) that the Douds, Gerende and Garner cases foreclose any contention that his rights are invaded by the Florida statute in requiring (to the extent that it does require) disclosures of current associations, contends that it is a different matter to demand information regarding past associations:

"This Court may have been willing to accept the swath cut across protected rights by an oath demanding disclosures of current associations; but it is a different matter to approve the devastation caused by an oath that demands complete information regarding all prior association, advocacy and belief."

In this connection Appellant relies on *Sweezy* v. *New Hampshire*, the concurring opinion of Mr. Justice Frankfurter in *Wieman* v. *Updegraff*, *National Association for the Advancement of Colored People* v. *Alabama*, and *Shelton* v. *Tucker*.

Do these decisions furnish any predicate whatever for invalidating a requirement that teachers as a condition to public employment make oath that they have not lent aid, support, advice, counsel or influence to the Communist Party? Manifestly, they do not.

Sweezy v. *Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311, dealt with a contempt conviction growing out of an investigation by the Attorney General of New Hampshire, conducted pursuant to a resolution of the state legislature authorizing the Attorney General to look into violations of the New Hampshire Subversive Activities Act and determine whether subversive persons were present within the state. The New Hampshire Supreme Court had sustained a conviction for contempt growing out of a witness' refusal to answer questions concerning a lecture given by him at the state university and questions concerning the Progressive Party and its adherents. This Court reversed the decision of the New Hampshire Supreme Court but the members of this Court differed as to the grounds of reversal. Mr. Chief Justice Warren and three Associate Justices rested their holding upon the failure of the state legislature to specify in its authorizing resolution that it desired the Attorney General to obtain the information to which the questions asked the witnesses related. Two other Associate Justices concurred in the result but disagreed with the holding stated in the opinion of Mr. Chief Justice Warren, grounding their conclusion on their view that the questions asked the witness infringed upon his constitutionally protected academic and political freedoms and that the state had failed to show that the infringement was justified in the protection of state interests. Two other Associate Justices dissented. Clearly this case has no bearing on our present problem.

The concurring opinion of Mr. Justice Frankfurter in *Wieman* v. *Updegraff*, 344 U.S. 183, text 194-198, 73 S. Ct. 215, 97 L. ed. 216, text 224-226, would unquestionably have great pertinence if scienter had not been held to be implicit in the provisions of our Florida statute and if our Florida statute completely tracked the Oklahoma statute in its various terms. However, with scienter implicit in each of the requirements of the Florida statute and with the differences that exist between the Oklahoma statute and the Florida statute, it is obvious on the face of things that Mr. Justice Frankfurter's concurring opinion in *Wieman* v. *Updegraff* forms no basis for invalidating our Florida statute.

In *National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. ed. 2d 1488, the State of Alabama sought to secure the Association's membership list and gave as its reason that it was seeking to determine whether the Association was conducting intrastate business in violation of Alabama's corporation registration statute. This Court held that Alabama had not demonstrated an interest in obtaining the disclosures it sought which was sufficient to justify the deterrent effect which those disclosures might well have on the free exercise by petitioner's members of their constitutionally protected right of association. That case, of course, has no bearing on the case at bar.

In *Shelton* v. *Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. ed. 2d 231, this Court held invalid an Arkansas statute which compelled every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he had belonged or regularly contributed within the preceding five years. There were three opinions written in connection with the decision of this Court—

one, the opinion of the Court, and the other two, dissenting opinions. All three opinions recognized the constitutionality of requiring such a disclosure of past associations as would be involved in a teacher making the oath required by our Florida statute:

> "There can be no doubt of the right of a state to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. * * *
>
> "This controversy is thus not of a pattern with such cases as National Asso. Advancement of Colored People v. Alabama, 357 U.S. 449, 2 L. ed. 2d 1488, 78 S. Ct. 1163, and Bates v. Little Rock, 361 U.S. 516, 4 L. ed. 2d 480, 80 S. Ct. 412. In those cases the Court held that there was no substantially relevant correlation between the governmental interest asserted and the state's effort to compel disclosure of the membership lists involved. Here, by contrast, there can be no question of the relevance of a state's inquiry into the fitness and competence of its teachers."
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> Opinion of the Court in *Shelton* v. *Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. ed. 2d 231, text 235-236.

> "If I dissent from the Court's disposition in these cases, it is not that I put a low value on academic freedom. * * * It is because that very freedom, in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers. This process of selection is an intricate affair, a matter of fine judgment, and if it is to be informed, it must be based upon a comprehensive range of information. I am unable to say, on the face of this statute, that Arkansas could not reasonably find that the information which the statute requires—and which may not be otherwise acquired than by asking the question which it asks—is germane to that selection."
>
> Dissenting opinion of Mr. Justice Frankfurter, in *Shelton* v. *Tucker*, *supra*, text p. 242 of 5 L. ed. 2d.

> "It is surely indisputable that a State has the right to choose its teachers on the basis of fitness. And I think it equally clear, as the Court appears to recognize, that information about a teacher's associations may be useful to school authorities in determining the moral, professional, and social qualifications of the teacher, as well as in determining the type of service for which he will be best suited in the educational system. * * * Furthermore, I take the Court to acknowledge that, agreeably to our previous decisions, the State may inquire into associations to the extent that the resulting information may be in aid of that legitimate purpose. * * * All that is now here is the validity of the statute on its face, and I am unable to agree that in this posture of things the enactment can be said to be unconstitutional."
>
> Dissenting opinion of Mr. Justice Harlan, in *Shelton* v. *Tucker, supra,* text pp. 243-244 of 5 L. ed. 2d.

In *Communist Party* v. *S. A. C. Board,* ..... U.S. ....., 81 S. Ct. ....., 6 L. ed. 2d 625, text 687, the Court set out the *ratio decidendi* of *Shelton* v. *Tucker,* as follows:

> "* * * the ratio decidendi of the decision was the absence of substantial connection between the breadth of disclosure demanded and the purpose which disclosure was asserted to serve."

While it is, of course, a little ludicrous for Appellant who swears in his complaint in this case (R. 2) that he has not lent aid, support, advice, counsel or influence to the Communist Party to claim that his constitutional rights are invaded by being required to disclose to the school authorities what he sets out in his sworn complaint, nevertheless if we look at this case as if it were brought by one who had in fact lent aid, support, advice, counsel or influence to the Communist Party, it should be clear now—as clear as a great mass of litigated cases can make anything clear—that a requirement of such an oath on the

part of a school teacher as a condition to public employment does not involve any unconstitutional compulsory disclosure of past associations.

See in this connection:

Adler v. *Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. ed. 517;

Beilan v. *Board of Public Education*, 357 U.S. 399, 78 S. Ct. 1317, 2 L. ed. 2d 1414;

Garner v. *Board of Public Works*, 341 U.S. 716, 71 S. Ct. 909, 95 L. ed. 1317;

Lerner v. *Casey*, 357 U.S. 468, 78 S. Ct. 1311, 2 L. ed. 1423;

Nelson v. *County of Los Angeles*, 362 U.S. 1, 80 S. Ct. 527, 4 L. ed. 2d 494;

Konigsberg v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 6 L. ed. 2d 105.

(c) Is the Florida Statute an Unconstitutional Bill of Attainder or Ex Post Facto Law As to a Teacher Who Did Knowingly Lend Aid, Support, Advice, Counsel or Influence to the Communist Party in the Remote Past Knowing of Its Subversive Nature but Who Has Since Repented?

We realize that if this question were actually open to Appellant to raise (which we do not think is the case), it would be a troublesome question for this Court to answer—particularly in view of the decision of this Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L. ed. 2d 796, where this Court held that a state court's finding that an applicant excluded from taking the state bar examination had not shown good moral character was not reasonably supported by the record notwithstanding that the record showed the applicant's admitted membership in the Communist Party from 1932 to 1940.

While the Schware case does hold that simple membership in the Communist Party (which membership might have been innocent), if it existed in the remote past, is not sufficient to bar an applicant from taking a bar examination, that, of course, is not tantamount to a holding that guilty membership in the Communist Party in the remote past would not be sufficient to bar an applicant for a public teaching position from teaching in the public school system. We respectfully submit that in view of the sensitive area in which a school teacher works, the public ought not to be required to subject young minds to the risk of being poisoned by persons who have had a guilty connection with the Communist Party in years gone by but who claim to have repented. While Communists who conceal their allegiance to the Party can do great harm in the legal profession, their opportunities for doing harm are infinitely greater in the teaching profession and we submit that the chance of that harm being done is great enough to warrant according the state the power to exclude those persons from the teaching profession.

The *Garner* case (341 U.S. 716, 71 S. Ct. 909, 95 L. ed. 1317), of course, established that the element of punishment is an essential of both a bill of attainder and an unconstitutional *ex post facto* law and that punishment is not imposed by a general regulation which merely provides standards of qualification and eligibility for employment as the ordinance prescribing the oath there in question was held to do.

In *Hawker* v. *New York*, 170 U.S. 189, 18 S. Ct. 573, 42 L. ed. 1002, this Court upheld a statute forbidding the practice of medicine by any person who had been convicted of a felony and sustained the statute as against a person who had been convicted of a felony fifteen years

before the passage of the statute; and this Court was not there impressed by the argument that the statute was unduly harsh in leaving no room for penitence:

> "It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist."

It is of particular interest to note that this Hawker case has been cited by this Court (apparently with approval) in a somewhat recent case relied on by Appellant in his Brief:

> "In disqualifying all convicted felons from union office unless executive discretion is exercised in their favor, Sec. 8 may well be deemed drastic legislation. * * *
>
> "Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas. * * * State provisions disqualifying convicted felons from certain employments important to the public interest also have a long history. See, e. g., Hawker v. New York, 170 U.S. 189, 42 L. ed. 1002, 18 S. Ct. 573. * * * The mask of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation,

such as the proper qualifications for a profession. See Hawker v. New York (U.S. text 157-160) supra."

DeVeau v. Braisted, 363 U.S. 144, 80 S. Ct. 1146, 4 L. ed. 2d 1109, text 1119-1120.

Appellant contends that the Florida statute is devoid of measures which would permit it to escape being a bill of attainder or *ex post facto* law as in the above case because it does not operate prospectively only but reaches into the past and "punishes" for past conduct since past conduct alone is ground for discharge. Appellant, of course, assumes the very thing he is seeking to establish, viz., that the requirement of the oath as a condition to employment of a teacher is intended as punishment rather than regulation. The fact is that in the DeVeau case the state was reaching into the past to the same extent as in the Florida statute. The state was saying that if a person has ever been convicted of a felony, he is disqualified from union office (unless executive discretion is exercised in his favor) just like, here, the state is saying that if a person has ever knowingly lent aid, support, advice, counsel or influence to the Communist Party knowing of its subversive nature, he is barred from teaching school in a public school system. We respectfully submit that the statute, as applied to school teachers, is a permissible regulation in determining the fitness of teachers.

We do not feel that this question of a bill of attainder or *ex post facto* is actually presented to this Court for a decision in this cause, affecting as such a decision would persons not before the Court and not Appellant at all and affecting situations that may arise in the future and not any situation that has actually arisen. But should this Court feel that the question should be decided, we respectfully submit that it is not unconstitutional to bar from employment as school teachers persons who have know-

ingly lent aid, support, advice, counsel or influence to the Communist Party knowing of its subversive nature even though such activities took place only in the remote past and such persons claim to have reformed since such time.

3. The Contention That the Florida Statute in Question Violates the First Amendment Guarantees of Freedom of Thought and Belief in the Provision of Said Statute Requiring, As a Condition to Employment As a Public School Teacher, Disavowal of Belief in the Overthrow of the Government of the United States or of the State by Force or Violence, Not Only Was Not Sufficiently Raised in or Passed on by the State Courts As to Require Decision but Would Not Raise a Substantial Federal Question If It Had Been Raised Before or Passed on by the State Courts.

We will refer later to the fact that the contention now made by Appellant that the required disavowal of belief violates constitutional guarantees of freedom of thought and belief was nowhere made in Appellant's complaint nor was such point specifically passed on by either the trial court or the Supreme Court of Florida. If the contention had been specifically made in the courts below by Appellant and passed on by such courts that the required negation of belief violated the First Amendment guarantees of freedom of thought and belief, such contention would not have presented a substantial Federal question. Such a contention is no longer fairly open in view of *American Communications Asso.* v. *Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. ed. 925, considered with *Adler* v. *Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. ed. 517, and *Speiser* v. *Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. ed. 2d 1460. Counsel for Appellant says (p. 28) that the "belief" provision in Section 9 (h) of the Labor Management Rela-

tions Act was sustained "by a 3-3 decision" in *American Communications Asso.* v. *Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. ed. 925. That is true so far as the total provision is concerned but Mr. Justice Frankfurter by restricting his dissent to Part VII of the Court's opinion and his comments elsewhere in his dissenting opinion made it clear that he would have sustained an affidavit requirement that the person executing the affidavit did not believe in the overthrow of the United States Government by force. Compare:

> "Justice Frankfurter in a separate opinion, concurring in part, agreed that Congress could validly require disavowal of actual membership in the Communist Party or of active belief in the overthrow of the government by force, but felt that to the extent that the Section went beyond that it was invalid."
>
> Note, 11 Maryland Law Review, p. 343.

The particular disavowal of belief in the oath required by Section 9 (h) of the Labor Management Relations Act to which Mr. Justice Frankfurter took primary exception in the Douds case had to do with the required disavowal of belief in the overthrow of the United States Government "by any illegal or unconstitutional methods". Mr. Justice Frankfurter commented (p. 420 of 339 U.S.):

> "It is asking more than rightfully may be asked of ordinary men to take oath that a method is not 'unconstitutional' or 'illegal' when constitutionality or legality is frequently determined by this Court by the chance of a single vote."

Mr. Justice Frankfurter reiterated his aversion to the phrase "overthrow of government 'by unlawful means'" in his dissenting opinion in *Garner* v. *Board of Public Works*, 341 U.S. 716, text 728, 71 S. Ct. 909, 95 L. ed. 1317, text 1326:

> "How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by 'unlawful means'?"

Concern over a similar phrase was again expressed by Mr. Justice Frankfurter in his dissenting opinion in *Adler v. Board of Education*, 342 U.S. 485, text 506, 72 S. Ct. 380, 96 L. ed. 517, text 531:

> "Concern over the latitude afforded by such phrases as 'the overthrow of government by * * * any unlawful means' when positions of trust or public employment are conditioned upon disbelief in such an objective cannot be deemed without warrant."

We, of course, have in the required disavowal of belief in the present case no such phrase as "the overthrow of government by unlawful means" or "the overthrow of government by unconstitutional means". The phrase here is "the overthrow of the Government * * * by force or violence". So far as the belief provision of Section 9 (h) was concerned it appears that what prevented Mr. Justice Frankfurter from concurring with the three Justices who sustained Section 9 (h) *in toto* was his inability to delete from the belief provision the words "or by any illegal or unconstitutional methods", Mr. Justice Frankfurter stating in that connection (pp. 421 and 422 of 339 U.S.):

> "If I possibly could, to avoid questions of unconstitutionality I would construe the requirements of Sec. 9 (h) to be restricted to * * * active belief, as a matter of present policy, in the overthrow of the Government of the United States by force. But what Congress has written does not permit such a gloss nor deletion of what it has written."

(So far as the reference to "active" belief in Mr. Justice Frankfurter's opinion is concerned, it is of interest to note that in construing the Smith Act, making a felony the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government of the United States by force or violence, this Court in *Scales* v. *United States*, ... U.S. ....., 81 S. Ct. ....., 6 L. ed. 2d 782, text 797, held that the membership clause reached only "active" members. Just as "active" membership was an implied requirement of the membership clause in the Smith Act, the oath required by the Florida statute can readily be construed as dealing with active belief only as the belief that the teacher would be disavowing in taking the specified oath.)

It would be distorting the meaning of the oath required by the Florida statute to say that it encompasses a disavowal of belief in the overthrow of a dictatorial government or the overthrow of the United States Government under some conceivable set of circumstances not now existing but that the imagination might conjure up. Clearly the required disavowal of belief has to do with the objective of overthrow by force or violence of the Government of the United States (or of the State) as it now exists under the Constitution. Compare: *American Communications Asso.* v. *Douds*, 339 U.S 382, text 407, 70 S. Ct. 674, 94 L. ed. 925, text 948; *Mountain Timber Company* v. *State of Washington*, 243 U.S. 219, text 246, 37 S. Ct. 260, 61 L. ed. 685, text 700; *Allen-Bradley Local* v. *Wisconsin E. Rel. Bd.*, 315 U.S. 740, text 746-747, 62 S. Ct. 820, 86 L. ed. 1154, text 1163.

In the Court's opinion in *American Communications Asso.* v. *Douds*, 339 U.S. 382, text 408, 70 S. Ct. 674, 94 L. ed. 925, text 949, the Court said that to attack the straw man of "thought control" is to ignore the fact that the

sole effect of the statute upon one who believes in overthrow of the Government by force and violence—and does not deny his belief—is that he may be forced to relinquish his position as a union leader. This language with reference to a union leader may well be considered in connection with the language of the Court in *Adler* v. *Board of Education*, 342, U.S. 485, text 492-493, 72 S. Ct. 380, 96 L. ed. 517, text 524, with regard to school teachers as follows:

> "It is first argued that the Feinberg Law and the rules promulgated thereunder constitute an abridgement of the freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.
>
> "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. American Communications Asso. C. I. O. v. Douds, 339 U.S. 382, 94 L. ed. 925, 70 S. Ct. 674. It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U.S. 75, 91 L. ed. 754, 67 S. Ct. 556. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because first, of their advocacy of the overthrow of the government by force or violence, or secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose.
>
> * * *

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."

Compare:

"Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualifications. The apprehended danger is real and abiding. We have long had evidences of the pressure here of a godless ideology ruthlessly fostered by a foreign power which has for its aim the violent overthrow of government and free society. And one of its weapons is the debasement of teaching as a softening measure in the consummation of the subversive process. * * * A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching. The teacher is not obliged to take the oath; but if he refuses to do so he is not entitled to teach. * * * 'There is of necessity a close association between belief in force and teaching which is intimately related to fitness. One may not divorce one's beliefs from one's teachings.'"

Thorp v. *Board of Trustees*, 6 N.J. 498, 79 A.2d 462, text 470 (Judgment vacated as moot in 342 U.S. 803, 73 S. Ct. 7, 96 L. ed. 608).

It is to be noted that the District Court of the District of Colorado, in a decision affirmed without written opinion by the Court of Appeals for the Tenth Circuit at page 218 of 268 F.2d, treated the constitutionality of section 9 (h) of the Labor Management Relations Act as

being established by the Douds case and as being recognized by subsequent cases of this Court and not requiring discussion. Judge Knous in the case referred to (*United States* v. *Pezzati*, 160 F. Supp. 787, text 789-790) stated:

> "Section 9 (h) does not violate the Federal Constitution (American Communications Ass'n C. I. O. v. Douds, 1950, 339 U.S. 382, 70 S. Ct. 674, 94 L. ed. 925). As stated by the United States Supreme Court, the purposes of section 9 (h) are:
>
> "(1) 'to protect the public not against what Communists ' * * advocate or believe, but against what Congress has concluded they have done and are likely to do again' (American Communications Association v. Douds, supra, 339 U.S. at page 396, 70 S. Ct. at page 683);
>
> "(2) 'to wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist Party and believers in the unconstitutional overthrow of our government' (National Labor Relations Board v. Highland Park Co., 1951, 341 U.S. 322, 325, 71 S. Ct. 758, 759, 95 L. ed. 969);
>
> "(3) 'to stop the use of the Labor Board by union leaders unwilling to be limited in government by the processes of reason' (National Labor Relations Board v. Dant, 1953, 344 U.S. 375, 385, 73 S. Ct. 375, 381, 97 L. ed. 407)."

The case of *Re Summers*, 325 U.S. 561, 65 S. Ct. 1307, 89 L. ed. 1795, is an important case on this question of belief in the oath required by our Florida statute. In that case this Court upheld the refusal of a state supreme court to admit to membership of its bar an otherwise qualified person on the sole ground that he had conscientious scruples against war and would not use force to prevent wrong under any circumstances. The state

court found that such person could not swear in good faith to uphold the state constitution which required service in the militia in time of war and this Court held that refusal to permit him to practice law did not violate the First Amendment as incorporated into the Due Process Clause of the Fourteenth Amendment. While the decision of this Court was predicated on this Court's view that it was impossible to conclude that the decision of such state court violated the principle of religious freedom which the Fourteenth Amendment secured against state action when a like interpretation of a similar oath as to the Federal Constitution barred an alien from national citizenship and while the decisions barring aliens from national citizenship if they refused to take the required oath (the Schwimmer, MacIntosh and Bland Cases) were overruled by *Girouard v. United States of America*, 328 U.S. 61, text 69, 66 S. Ct. 826, 90 L. ed. 1084, text 1090, this Court gave no indication in such opinion of overruling Re Summers. So far as we have been able to determine Re Summers is still an authoritative decision.[3] While the belief provision in our Florida statute could very readily be sustained in the present case notwithstanding a rejection of Re Summers, it is difficult to see how such belief provision could possibly be deemed invalid if Re Summers is to stand. We submit that conclusion reached in Re Summers is sound and that such case should be adhered to. However, at all events we submit there is no sound basis for holding that the consti-

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3. Compare Footnote 11 to Dissenting Opinion of Mr. Justice Black in *Re Anastaplo*, U.S. , 81 S. Ct. , 6 L. ed. 2d 135, text 154: "For a similar case, see *Re Summers*, 325 U.S. 561, 89 L. ed. 1795, 65 S. Ct. 1307, in which a 5-4 majority of this Court upheld an informal order of the Illinois Supreme Court denying Bar Admission to Clyde W. Summers on the ground that his religious beliefs were inconsistent with the Illinois Constitution."

tutional rights of a school teacher are invaded by requiring him as a condition to public employment to swear that he does not believe in the overthrow of the Government of the United States or of the State by force or violence.

The contention now made by Appellant that the requirement in the subject statute that Appellant negative his belief in the overthrow of the Government by force or violence violates the First Amendment guarantees of freedom of thought and belief was not passed on by the Supreme Court of Florida (R. 11-19) or specifically referred to in the Court's opinion. Reference to Appellant's complaint (R. 1-4) will show that such contention was not specifically raised in the complaint nor was it mentioned as a specific contention in the Circuit Judge's opinion (R. 7-8). (This particular clause of the prescribed oath was not referred to at all in the Circuit Judge's opinion nor was any reference at all made to "freedom of thought" or "freedom of belief".)

It is the rule in Florida (*Henderson* v. *Antonacci*, 62 So.2d 5, text 8) as well as generally (16 C.J.S. 331-332) that courts should not voluntarily pass upon constitutional questions which are not raised by the pleadings. It is also the rule in Florida (*Smith* v. *Ervin*, 64 So.2d 166, text 171) and generally (16 C.J.S. 335-336; *Corn* v. *Fort*, 170 Tenn. 337, 95 S.W.2d 620, text 628) that one who challenges the constitutionality of an act of the Legislature must point out to the court exactly how and in what manner his constitutional rights will surely be, or have been, invaded or infringed.

Paragraph 8 of the complaint (R. 2-3) is the paragraph which sets out Appellant's attack on the subject statute. Outside of the general charge at the end of the

paragraph (R. 3) that the requirement of the oath in its entirety deprives plaintiff of due process of law, the only allegation in paragraph 8 that could conceivably have anything to do with a contention that requiring Appellant to negative the specified belief violates the guaranteed freedom of thought and belief is the first sentence (R. 2) in which Appellant asserts that the requirement that he execute the oath as a condition precedent to his continuing employment by the defendant "is a violation of his rights as a free, loyal American citizen as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States". This allegation clearly is too general and vague to present the particular constitutional claim now made and lacks the requisite specificity: 16 C.J.S. 335-339; *State* v. *Flanigan*, 349 Mo. 54, 159 S.W.2d 598; *Jewel Tea Co.* v. *Rowe*, 414 Ill. 495, 111 N.E.2d 568; *Biggs* v. *Cummins*, 5 Ill.2d 512, 126 N.E.2d 208, text 210; *Glover* v. *City of Rome*, 173 Ga. 239, 160 S.E. 249. See also: *Stembridge* v. *Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. ed. 1130; *Thomas* v. *Iowa*, 209 U.S. 258, 28 S. Ct. 487, 52 L. ed. 782.

The rule is, of course, well established in this Court that this Court will not on an appeal from a state court consider constitutional questions which have not been seasonably raised before or passed on by the state court: *Nelson* v. *County of Los Angeles*, 362 U.S. 1, text 9, 80 S. Ct. 527, 4 L. ed. 2d 494, text 500; *Adler* v. *Board of Education*, 342 U S. 485, text 496, 72 S. Ct. 380, 96 L. ed. 517, text 526; *Edelman* v. *California*, 344 U.S. 357, text 358, 73 S. Ct. 293, 97 L. ed. 387, text 391; *Maxwell* v. *Newbold*, 18 How. 511, 15 L. ed. 506; *Harding* v. *Illinois*, 196 U.S. 78, 25 S. Ct. 176, 49 L. ed. 394.

It is respectfully submitted that the question of whether requiring Appellant to negative under oath his

belief in the overthrow of the Government by force or violence was an unconstitutional violation of freedom of thought or freedom of belief guaranteed to him by the First Amendment (as incorporated into the Fourteenth Amendment) was not either raised in or passed on in the state courts and that, if such question had been suitably raised in or passed on in the state court, it would not have presented a substantial Federal question.

4. The Contention That the Oath Required by the Florida Statute Is Unconstitutionally Vague Does Not Present a Substantial Federal Question.

It is the contention of Appellant that the following portions of the oath required by the Florida statute are unconstitutionally vague:

(1) "I have not * * * lend (lent) my aid, support, advice, counsel for influence to the Communist Party";

(2) "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence";

(3) "I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence".

In *Osman* v. *Douds*, 339 U.S. 846, text 847, 70 S. Ct. 901, 94 L. ed. 1328, text 1329, seven out of eight of the participating Justices held the affidavit requirement of Section 9 (h) of the National Labor Relations Act to be constitutional "with regard to that part of the section which is concerned with membership in, or affiliation with, the Communist Party".

In *Adler* v. *Board of Education*, 342 U.S. 485, text 496, 72 S. Ct. 380, 96 L. ed. 517, text 526, the Court, while actually dealing directly only with the meaning of the word "subversive," held that the clause "an organization that teaches and advocates the overthrow of government by force or violence" was a clause with a very definite meaning.[4]

In *Garner* v. *Board of Public Works*, 341 U.S. 716, 71 S. Ct. 909, 95 L. ed. 1317, while no issue of vagueness was expressly passed on by the Court, the oath which the Court sustained contained among other clauses the following:

> "I further swear * * * that I * * * have not within the period beginning five (5) years prior to the effective date of the ordinance * * * advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I * * * have not, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of Florida."

The particular oath involved in *American Communications Asso.* v. *Douds*, 339 U.S. 382, 415, 94 L. ed. 925, was that the Union officer "is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods". Mr. Justice Frankfurter, who

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4. The language of the Court being: "When used in subdivision 2 of Section 3022, the word (subversive) has a very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence." (p. 496 of 342 U.S.).

did not agree with some of the views of Chief Justice Vinson and the two Justices who concurred with the Chief Justice in the last mentioned Douds case and who dissented in the Garner case, had the following comments to make in his dissenting opinion in *Adler* v. *Board of Education*, 342 U.S. 485, text 506, 72 S. Ct. 380, 96 L. ed. 517, text 531, regarding the Douds case and the Garner case:

> "In these cases the Court had ground for limiting the reach of a dubious formula."

When the language of the oath involved in the present case is considered in the light of the discussion of the question of vagueness in *Scales* v. *United States*, ... U.S. ....., 81 S. Ct. ....., 6 L. ed. 2d 782, text 798, and when it is further considered that long prior to the time Appellant was asked to execute the oath prescribed by the Florida statute the Supreme Court of Florida in *State* v. *Diez*, 97 So.2d 105, text 110, had held scienter to be implicit in the Florida statute, and when it is further considered that the oath prescribed by the Florida statute does not have the particular language that was considered by Mr. Justice Frankfurter to be the objectionable part of the oath required by Section 9 (h) of the National Labor Relations Act, it is submitted that no substantial constitutional question is presented by Appellant's claim that our Florida statute is unconstitutionally vague.[5]

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5. Compare: *Fitzgerald* v. *City of Philadelphia*, 376 Pa. 887, 102 A.2d 887, text 890; *Lohman* v. *United States*, 251 F.2d 951, text 954.

CONCLUSION.

In concluding this Brief, it is our position that our motion to dismiss the appeal should be granted; but, in the event this Court should deny the motion to dismiss the appeal, it is respectfully submitted that the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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BRIEF AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 72

DAVID WALTON CRAMP, JR.,
Appellant,

vs.

BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR AMICUS CURIAE

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IN THE

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October Term, 1961

No. 72

DAVID WALTON CRAMP, JR.,
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BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY, FLORIDA
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR AMICUS CURIAE

OPINIONS BELOW

The opinions, judgments and orders of the Supreme Court of Florida, and the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, in this case are reported at 125 So. 2d, 554, in the first instance and are unreported in the second.

JURISDICTION

The judgment of the Supreme Court of Florida was filed November 16, 1960, petition for rehearing denied January 17, 1961, appeal to the Supreme Court of the United States was thereafter filed pursuant to 28 U.S. Code 1257(2). Order of the Supreme Court of the United States postponing jurisdiction, entered May 29, 1961.

QUESTION PRESENTED

Appellant asserts the unconstitutionality of Sections 876.05 and 876.06, Florida Statutes, which require public employees to execute the following oath:

> "I, _____, a citizen of the State of Florida and of the United States of America, and being employed by or an officer of _____ and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

Appellant attacks the prescribed oath in its entirety without specifically pointing out the wording of the oath to which a particular attack is directed. In order to clarify appellants contentions we have rephrased his question into three parts as follows:

1. Does the execution of the portion of the oath set forth below, as a condition to public employment violate the due process and equal protection clauses of the Fourteenth Amendment:

> "I am not a member of the Communist Party;" . . .
> "I am not a member of any organization or party that believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence."

2. Does the requirement that an employee, as a condition to public employment, avow that, . . .

> "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence"

violate First Amendment guaranties of freedom of speech, thought and association.

3. Does the requirement that an employee file an oath that

> "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party"

constitute a bill or attainder and an ex pos facto law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10, of the Constitution of the United States provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

F.S. 876.05 provides:

> "All persons who are now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgements of instruments for public record in the state in the following form:
>
> 'I, _____ , a citizen of the State of Florida and of the United States of America, and being employed by or an officer of _____, and

a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.'

"And said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation."

F.S. 876.06 provides:

"If any person required by § § 876.05-876.10 to take the oath herein provided for fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving."

STATEMENT OF THE CASE

David Walton Cramp, Jr., appellant herein, was an employee of the Board of Public Instruction of Orange County, Florida. Shortly prior to the institution of this litigation (January 11, 1960) appellant refused to execute the oath prescribed by Section 876.05, Florida Stat-

utes. Upon such refusal, appellee school board recommended appellant be discharged pursuant to Section 876.06, Florida Statutes. Appellant instituted suit in Circiut Court of the Ninth Judicial Circuit in and for Orange County for declaratory relief pursuant to Section 87.01, Florida Statutes, to ascertain whether or not the oath was constitutional and if he had to sign the oath as a condition of his continuing employment. On March 16, 1960, the Circuit Court declared the statute valid. The Supreme Court of Florida, on appeal, affirmed the court below in its opinion filed November 16, 1960. This appeal to the Supreme Court of the United States followed.

SUMMARY OF ARGUMENT

As indicated in the Question Presented appellant attacks the prescribed oath in its entirety without specifically pointing out the wording of the oath to which a particular attack is directed:

Our argument deals separately with each rephrased portion of the question.

1. The execution of the portion of the oath that I am not a member of the Communist Party and do not belong to an organization that believes in the overthrow of the government by force or violence does not violate the due process and equal protection clause of the Fourteenth Amendment. This section merely prescribes the execution of an affidavit as a condition of employment. The question of scienter is implicit. The denial by a state of employment is not a denial of a property right secured by the due process clause.

2. The requirement that an employee avow disbelief in the overthrow of the Government by force and violence does not infringe upon First Amendment freedoms. This question is not one which can properly by raised by the appellant at this time. Even if it could be raised ample authority supports the validity of similar requirements. No restriction of speech or thought is involved.

3. The requirement that an employee swear he has not lent his aid, support, advice, counsel or influence to the Communist Party is constitutional even if applied to the remote past. As to this contention, the appellant again is not entitled to raise the question as it could not possibly adversely effect him.

ARGUMENT

1. Does the execution of the portion of the loyalty oath set forth below, violate the due process and equal protection clauses of the Fourteenth Amendment:

> **"I am not a member of the Communist Party;" ...**
> **"I am not a member of any organization or party that believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of the State of Florida by force or violence."**

The appellant readily admits that a state may exclude from its employ knowing members of the Communist Party, or others advocating as an objective, the violent and forcible overthrow of the Government.

Appellant objects to the method used by Florida to accomplish this exclusion, contending that the wording

of the portion of the Florida oath in question violates the due process and equal protection clauses of the Fourteenth Amendment.

We fully agree that under the due process and equal protection clauses of the Fourteenth Amendment that states are prohibited from depriving any person of life, liberty, or property without due process of law.

We do not agree that the execution of the oath as a requisite of employment deprives a person of these basic freedoms. It is evident from the face of this provision of the Fourteenth Amendment that before a party can properly invoke the due process clause, he must show wherein the particular law deprives him of life, liberty or property. The appellant cannot so do. The section in question prescribes the execution of an affidavit as a condition of employment and of receiving compensation from the State. In effect, it sets one of the terms with which one must comply who desires to obtain or continue public employment. The United States Supreme Court has pointed out that the loss of a particular position is not the loss of life or liberty. (*American Communications Association v. Douds*, 339 U.S. 382, 409, 94 L. Ed. 925, 949) And that an "unlawful denial by state action of a right to a state political office is not a denial of a right of property or of liberty secured by the due process clause." (*Snowden v. Hughes*, 321 U.S. 1, 7, 88 L. Ed. 497, 502). There is no indication that the cited statute denies compensation for services rendered prior to its effective date.

While it is recognized that government has the power to exclude from public employment communists and others who advocate its violent overthrow (*Adler v. Board of Education*, 342 U.S. 485, 96 L. Ed. 517), requirements of due process are considered applicable to the means adopted to implement the power. A state may validly provide that a person who is knowingly a member of an organization which advocates the overthrow of constitutional government by unlawful means shall not be eligible for public employment. (*Adler v. Board of Education*, 342 U.S. 485, 96 L. Ed. 517) But a law which disqualifies on the basis of mere membership regardless of any awareness of the organization's purpose or character is said to be arbitrary and void. (*Wieman v. Updegraff*, 344 U.S. 183, 97 L. Ed. 216)

Relying on the rule in the Wieman case, the appellant contends the oath is objectionable for lack of scienter. This argument cannot be sustained. The affidavit's negation is limited to knowing membership in subversive organizations. We cannot accept appellant's suggestion that the word "knowingly" refers to knowledge of whether the affiant is a member rather than knowledge of the character of the organization. The provision must be given a reasonable, commonsense interpretation. The affiant obviously would know the facts of his own membership as reasonably construed. The affidavit negates only membership in organizations known to have the prescribed character. It does not affect persons who might have innocently formed or continued affiliations with this subversive organization unaware of its nature or purpose. The subject matter of the affidavit is clearly one

upon the basis of which the state may determine the fitness of its employees. (*Adler v. Board of Education*, 342 U.S. 485, 96 L. Ed. 517) It is limited to present membership or affiliation. The United States Supreme Court in the *Garner case*, 341 U.S. 716, 95 L. Ed. 1317, where a similar oath was challenged as violating due process because not limited to organizations known by the employee to be within the prescribed class, stated:

> "this argument was rejected because we felt justified in assuming that scienter was implicit in each clause of the oath."

The Florida Supreme Court expressed the same view in *State v. Diez*, 97 So.2d 105:

> "This conclusion does not lead to a decision declaring the Act unconstitutional because we think it is inherent in the law that when one takes the oath that he has not lent aid, advice, counsel and the like to the Communist Party, he is representing under oath that he has not done so knowingly."

In *Pockman v. Leonard*, 345 U.S. 962, 73 S.Ct. 951, 97 L. Ed. 1381, this Court dismissed for the want of a substantial Federal question an appeal seeking to review a decision of the Supreme Court of California in *Pockman v. Leonard*, 39 Cal. 2d 676, 249 P. 2d 267, which sustained an oath prescribed by a statute that required each civil defense worker to swear that he did not belong to any organization that advocated overthrow of government by force or violence or other unlawful means.

Appellant, in his complaint, avers under oath that he is not a member of the Communist Party and that he is

not a member of any organization or party, which believes in, or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

We conclude that neither the execution, by the appellant of the portions of the oath discussed herein, nor failure to so execute the oath deprives him of life, liberty or property within the meaning of the due process clause.

2. Does the requirement that an employee, as a condition to public employment, avow that

> **"I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence"**

violate First Amendment guaranties of freedom of speech, thought and association?

> The pertinent wording complained of is as follows: "I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence."

By the allegations of his complaint, appellant disavows any belief in the violent overthrow of either the State or Federal Government. The contention now made by appellant that the required disavowal of belief violates constitutional guaranties of freedom of thought and of speech, was no where made in appellant's complaint, nor were such points specifically passed on by either the trial court or the Supreme Court of Florida. Even if, such

contentions were properly before the court it would not be an unwarranted restriction upon freedom of thought or speech. An affidavit requirement similar in scope, was held valid in *American Communications Association v. Douds*, 339 U.S. 382 70 Supreme Court, 674, 94 L. Ed. 925. That case involved the non-communist affidavit provision contained in Section 9H of the Labor Management Relations Act. The section requires, as a condition to labor unions receiving the benefits of facilities provided by the act that each of its officers file an affidavit stating that he is not a member of or affiliated with the Communist Party, and that he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the Government by force or other illegal methods. In a lengthy opinion, the court disposed of numerous attacks on constitutional grounds and concluded as follows: 339 U.S. 415, 94 L. Ed. 952-953.

> "Clearly the Constitution permits the requirement of oaths by officers to uphold the Constitution itself. The obvious implication is that those not willing to take such oath are to be barred from public office. For the President a specific oath was set out in the Constitution itself. Article II, Section 1. And Congress has detailed an oath for other federal officers. Obviously the framers of the Constitution thought that the exaction of minimal loyalty to the government was worth the price of whatever deprivation of individual freedom of conscience was involved. All that we need to hold here is that the casting of Section 9(H) into the mold of an oath does not invalidate it, if it is otherwise constitutional. We conclude that Section 9(H) of the Labor Management Relations Act as herein construed is compatible with the Federal Constitution and may stand."

This requirement obviously was a reasonable attempt to accomplishing the purpose of eliminating communists and other subversive persons from holding office. Further, appellant's contention is not valid in view of the Decisions of the Supreme Court of the United States in *Adler v. Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517 and *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460. The appellant also asserts that the law in question is an unwarranted denial of the right to speak. He fails to point out the way in which he considers such right to be involved here. The statute simply provides for the execution of affidavit of fact. It does not purport to limit or restrict the right of employees to speak or assemble.

The contention made in appellant's brief that the disavowal of belief violates First Amendment guaranties was not passed on by the Supreme Court of Florida or specifically referred to in the Courts opinion. Neither was such contention raised in appellant's complaint.

It is the rule in Florida (*Henderson v. Antonacci* 62 So. 2d 5, Text 8) that courts should not voluntarily pass upon constitutional question not raised in the pleadings. The rule is also well established that this Court will not consider constitutional questions which have not been properly raised before or passed on by the state court. (*Nelson v. County of Los Angeles*, 362 U.S. 1, Text 9, 80 S. Ct. 527, 4 L. Ed. 2d 494, Text 500.)

3. Does the requirement that an employee file an oath that

"I have not an will not lend my aid, support, advice, counsel or influence to the Communist Party,"

constitute a bill of attainder and an ex post facto law?

The remaining portions of the oath in question are as follows:

> "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party;"

Appellant contends that this portion of the oath constitutes a bill of attainder and an ex post facto law. Appellant loses sight of the fact that the statute does not purport to designate a crime or offense for which punishment is imposed, but merely prescribes a standard of eligibility. In (*Garner v. Board of Public Works*, 341 U.S. 716, 95 L. Ed. 1317) an ordinance required every city employee to execute an affidavit disclosing any past or present membership in the Communist Party. In upholding the validity the Supreme Court pointed out that the city or state is not disabled from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." The negation required in the case involved, being limited, not to past membership, but to past or present aid, support, advice, counsel or influence, is even less subject to objection.

Its content is similar to that upheld in *Gerende v. Board of Supervisors*, 341 U.S. 56, 95 L. Ed. 745. The

claim that the oath constitutes the bill of attainder is likewise without merit. Bills of attainder are legislative acts inflicting punishment on certain persons without judicial trial. No punishment is inflicted by the statute which merely prescribes standards of eligibility for public employment. The Florida Supreme Court disposed of appellants bill of attainder and ex post facto contentions as follows:

> ". . . There could not possibly be a legislative adjudication of guilt for the simple reason that the complaint upon which appellant stands affirmatively points out that appellant has never been connected with any organization that could result in guilt. Furthermore as to this appellant the statute could not constitute an ex post factor law for the obvious reason that appellant asserts that he had never in the past been connected with any organization which could lead to current punishment. In short, because of the allegations of his own complaint, the appellant teacher has unequivocally demonstrated that he has no standing to assault the subject statutes on the grounds that it is a bill of attainder, or an ex post facto law." (*Cramp v. Board of Public Instruction of Orange County, Florida*, 125 So.2d 554)

The Florida Supreme Court's position in this matter is further substantiated by the ruling in *National Maritime Union of America v. Herznog*, 78 F. Supp. 146, (D.C. Dist.) affirmed in 344 U.S. 854, 68 S. Ct. 1529, 92 L. Ed. 1776.

We do not question that if this case involved a public employee who had in fact lent aid, support, advice, coun-

sel or influence to the Communist Party, but who now disavows or disclaims present membership or belief, we would have a substantial federal question as to whether such person could be denied public employment.

SUMMARY

Appellant has contended that the execution of the Florida Loyalty Oath as a requisite of public employment violates the due process and equal protection clause of the Fourteenth Amendment; infringes upon the guaranties of freedom of speech, thought and association of the First Amendment; and is an ex post facto law and bill of attainder.

An examination of relevant authorities and precedents reveals the Florida oath to be similar in scope and effect to the several oaths upheld by the Supreme Court of the United States as not violating constitutional guaranties.

Further examination leads us to take the position that even if the Florida Oath might be construed to be in violation of the rights of certain individuals, that appellant's particular situation is such that he has no standing to assert its invalidity.

CONCLUSION

As we conclude, it should be made clear that the Attorney General of Florida is vitally concerned with the preservation of the constitutional rights of the citizens of this state to assemble, speak, think and believe as they will, but the Attorney General thinks it is equally clear

that a state has the right, power and duty to preserve its own integrity. No citizen has the unqualified right to become a public school teacher upon his own terms, or to become a public employee. He may be employed by the State upon the reasonable terms promulgated by the Legislature of the State. In the event he does not choose to work on those terms he is at liberty to retain his beliefs and associations and go elsewhere.

Public employees occupy unique and critical positions in public life. As applies to public school teachers, the problem is particularly acute. The teacher molds and shapes the minds of his students and directs them toward their ultimate goal of assuming a useful role in the society in which they live. The state has a vital concern and a tremendous responsibility in this respect. An educated person is characterized by his ability to reason, think and analyze in an objective matter, carefully considering all facts and issues before making a decision. The duty devolves upon the state public school system to insure that instructional personnel are sincere, loyal citizens capable of imparting objective ideals in the minds of their students.

In the current struggle for men's minds, we believe the state, both morally and legally, is well within its province of insuring integrity and loyalty to our form of government in the educational process as against those who would pervert it to subversive ends.

As to the effectiveness of the Florida oath in accomplishing this goal we cannot argue. The Florida Legisla-

ture, in its wisdom enacted the measure utilizing as a guide both the Federal government's and other states' attempts to forestall the impending infiltration into public life of those persons whose avowed purpose is the overthrow of the democratic system of government.

We conclude, that the execution of the Florida oath, as a requisite of public employment is a reasonable and constitutional means of accomplishing the Legislative purpose.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, Ralph E. Odum, Attorney for the State of Florida as amicus curiae and a member of the Bar of The Supreme Court of the United States, hereby certify that on _____ _____ September, _____, 1961, I served copies of the foregoing brief for the Attorney General of Florida as amicus curiae on the attorney for the appellant, Tobias Simon and Appellee, the Board of Public Instruction of Orange County, Florida, by mailing a copy thereof in a duly addressed envelope with postage prepaid to the office of Tobias Simon, 706 Ainsley Building, Miami, Florida, and to the office of J. R. Wells, Esquire, c/o Maguire, Voorhis and Wells, 135 Wall Street, Orlando, Florida.

_____

Ralph E. Odum